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Case No. 00-1553

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM VAN POYCK, *Petitioner*

vs.

STATE OF FLORIDA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL'S CLOSING ARGUMENT WAS APPROPRIATE TRIAL STRATEGY.

II. PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR "PER SE" INEFFECTIVENESS OF COUNSEL WHEN THE ALLEGATIONS REGARDING APPELLATE COUNSEL'S MENTAL INFIRMITIES AND DRUG USE FOUR YEARS AFTER PETITIONER'S APPEAL ARE IRRELEVANT .

III. PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY REGARDING THE EXISTENCE OF THE REQUISITE ENMUND/TISON FINDINGS AND THE APPLICABLE JURY INSTRUCTIONS.

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OPINIONS BELOW

The unreported single-judge order of the United States Court of Appeals, Eleventh Circuit, dates August 30, 2000, granting in part and denying in part Petitioner's motion to expand his certificate of appealability, appears in Petitioner's Appendix at A-2 through A-4. The November 9, 2000 order denying Petitioner's Motion for Reconsideration by a three judge panel appears in Petitioners Appendix at B-1 through B-2.

CONSTITUTIONAL PROVISIONS

Respondent accepts as accurate Petitioner's statement regarding the applicable constitutional provisions involved.

JURISDICTION

Petitioner is seeking jurisdiction pursuant to 28 U.S.C. § 1254 (1) and Hohn v. United States, 524 U.S. 236 (1998). However, this court does not have jurisdiction. The circumstances of Hohn v. U.S. illustrate the review on the merits that may enter a decision to deny a certificate of appealability, not a situation where a judge has denied relief without written opinion. In the instant case, there has been no written opinion regarding Petitioner's claims. Hence, Hohn does not apply.

Moreover, pursuant to Jones v. U.S., 224 F. 3d 1251 (11th Cir. 2000), under the plain language of Fed. R. App. P. 22 (b)(2), the applicant gets "two bites at the appeal certificate apple": one before the district judge, and if that one is unsuccessful, he gets a second one before a circuit judge. See also, Hunter v. United States, 101 F. 3d 1565 (11th Circ. 1996)(en banc). In this instance, the Petitioner has had three chances to obtain a certificate of appealability, once before the district court and twice in the circuit court. This court should deny the petition for lack of jurisdiction.

STANDARD OF REVIEW

To obtain a certificate of appealability (COA), a habeas Petitioner must make a substantial showing of the denial of a constitutional right, and that demonstration includes showing that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further. Slack v. McDaniel, 529 U.S. 473, (U.S. 2000); 28 U.S.C.A. § 2253(c).

STATEMENT OF THE CASE AND FACTS

On February 3, 1999, Petitioner filed a Petition for a Writ of Habeas Corpus in the United States District court for the Southern District of Florida, raising 15 issues. Petitioner also filed a motion for an evidentiary hearing and a motion for leave to conduct discovery. On May 17, 1999, the Respondent filed a response to the petition for habeas corpus. On September 20, 1999, the District Court denied relief on all issues. Petitioner filed a notice of appeal and an application for a certificate of appealability for 16 issues. On November 15, 1999 the District Court certified two issues and denied certification on all others.

On February 11, 2000, Petitioner filed a Motion for Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit, seeking a COA on 11 issues. On August 30, 2000, a single judge granted a COA on four additional issues, but denied a COA for the other seven.

Petitioner filed a "Motion for Reconsideration by Three-Judge Panel of Single Judge's Denial in part of Certificate of Appealability", wherein, Petitioner sought a COA for three of the seven issues for which a certificate had been denied. On November 9, 2000, the Court of Appeals denied Petitioner's motion for reconsideration without written opinion.

1. Facts Pertaining to Question I

Respondent can not accept the facts as recited by Petitioner. The Petitioner has misread the record on appeal. Trial Counsel, Klein, argued that the death occurred during the escape and robbery but that it was not a consequence of, or in furtherance of either felony, rather it was an act committed independently by his co-defendant Valdez (ROA 2899-2900). Klein was emphasizing that Petitioner's only intent was to free

his friend, O'Brien, and that death was not contemplated nor a part of the escape plan.

2. Facts Pertaining to Question II

Appellate counsel's alleged drug abuse relates to a period of time well after Petitioner's appeal became final and encompasses a period of time in appellate counsel's life that occurred four years after the initial brief was filed. (Petitioner's App. D-21). The District Court denied the request since appellate counsel's alleged mental infirmities or drug abuse is irrelevant to the issue of ineffective assistance of counsel.

3. Facts Pertaining to Question III

Notably, the Petitioner has previously raised the Enmund/Tison claim in a petition for certiorari before this court in 1990 and this court denied the petition.

The record, which includes Van Poyck's own admissions that he planned O'Brien's escape, took responsibility for Griffis' death and admitted to possessing a gun, wholly undermines any claim that Van Poyck's non-triggerman status would have resulted in anything less than a capital conviction and sentence. In upholding his conviction and sentence of death on direct appeal, the Florida Supreme Court found that Petitioner approached the van, pointed a gun at Officer Turner and ordered him out of the van. At the same time, Petitioner's accomplice, Valdez, was on the other side of the van with the decedent, Griffis. Petitioner forced Turner under the van where Turner saw two sets of feet at the back of the van. Turner heard a series of shots and Griffis fell to the ground. Petitioner pulled Turner from under the van and attempted to kill him. Petitioner admitted that he armed

himself with three guns, one of them being the actual murder weapon. Van Poyck v. State, 564 So. 2d 1066 (Fla. 1990).

Petitioner has not called into question these findings.

With respect to Petitioner's attack on the propriety of the jury instructions, the District Court found that during closing argument, the prosecutor and defense counsel both referred to the written jury instructions and read the word lethal not illegal (Petr. App D-2).

REASONS FOR DENYING THE WRIT

QUESTION I

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF THE DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL WHERE COUNSEL'S CLOSING ARGUMENT WAS APPROPRIATE TRIAL STRATEGY.

Petitioner claims that it was inexcusable for Klein to concede that Petitioner was guilty of the underlying felonies of robbery and attempted escape in this felony murder case.

The district court's findings are presumed correct unless they are clearly erroneous. Petitioner has failed to carry his burden that the findings are clearly erroneous, therefore, review of this issue is impermissible.

In it's order denying the habeas petition, the district judge specifically found that trial counsel did not concede guilt. The district judge determined that admissions in closing argument that are undeniable are not inappropriate. McClain v. Hill, 52 F. Supp 2d 1133 (C.D. Ca. 1999). Such admissions can lend credibility to other arguments. U.S. v. Short, 181 F. 3d 620, 624-625 (5th Cir. 1999); U.S. v. Wilks, 46 F. 3d 640 (7th Cir. 1995). The district judge reasoned that in this case, counsel's closing argument was appropriate trial strategy given the defendant's testimony and the independent act aspect of the felony murder instruction. U.S. v. Gomes, 177 F. 3d 76 (1st Cir. 1999).

Moreover, in McNeal v. Wainwright, 722 F. 2d 674 (11th Cir. 1984), the case centered on a tactical decision in a first degree murder case, where defense counsel argued that the

murder was not premeditated and that the jury should find at most that McNeal was guilty of manslaughter. The court reasoned that the arguments were tactical and strategic moreover there was overwhelming evidence against McNeal. Id. Furthermore, in that case, defense counsel consistently stressed McNeal's emotional state in an attempt to negate premeditation. Id.

The Petitioner relies on United States v. Cronic, 104 S. Ct. 2039 (1984), arguing that under that case, concessions of guilt constitute per se ineffectiveness, when such concessions result in a complete breakdown in the adversarial process. However, Cronic also says that the Sixth Amendment does not require that counsel do what is impossible or unethical, if there is no bona fide defense to a charge, counsel can not create one and may disserve the interests of his client by attempting a useless charade. Id.

A review of the transcript reveals that Klein did not concede guilt. Petitioner takes Klein's argument out of context. During closing argument, counsel stated that death did occur during the escape and robbery but that it was not a consequence of or in furtherance of either felony, but it was committed independently by Valdez. (ROA 2899-2900). Klein attempted to emphasize that Petitioner's only intent was to free O'Brien. Death was not contemplated, nor was it a part of the plan. (ROA 2900).

Given the overwhelming evidence against Petitioner, Klein's actions were not unreasonable. For example, Officer Turner testified unequivocally that Petitioner pointed a gun at him and took his [Turner's] gun. (ROA 1685-1691). Petitioner, knowledgeable about the felony murder rule, admitted on the stand that he put a gun to Turner's head, put him in fear, and took his gun. (ROA 2633-34). Turner was permanently deprived of his gun which was then used during the crime. (ROA 2633-34).

Evidence to establish the escape also came from Turner and Petitioner, himself. In fact, Petitioner testified that he planned the whole escape. He had contemplated freeing O'Brien since 1985. (ROA 2648, 2680, 2622, 2571-97). Further, Petitioner stated that he was going to testify at O'Brien's upcoming trial to explain that O'Brien was unaware of the escape attempt. (ROA 2662). Clearly, in light of the evidence against Petitioner, including his own testimony, Klein's strategy to emphasize that Petitioner did not kill Griffis was reasonable. See Kelly v. United States, 820 F.2d 1173 (11th Cir. 1987)(finding concession of guilt on importation charges in attempt to persuade jury of defendant's innocence on distribution charges reasonable where defendant arrested on boat loaded with marijuana).

Petitioner has failed to establish prejudice. He has offered no viable alternative to Klein's actions. To suggest that counsel should have argued that Turner's gun was not taken with intent to permanently deprive the officer of the weapon is not credible, given that the officer's gun was used during the rest of the criminal episode and ultimately found in the get-a-way car.

Hence, in light of the unassailable factual determination made by the district court, a certificate of appealability was properly denied because Petitioner has failed to demonstrate that reasonable jurists could debate whether, or agree that, the petition should have been resolved in a different manner, or that the issue was adequate to deserve encouragement to proceed further.

QUESTION II

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY FOR "PER SE" INEFFECTIVENESS OF COUNSEL WHEN THE ALLEGATIONS REGARDING APPELLATE COUNSEL'S MENTAL INFIRMITIES AND DRUG USE FOUR YEARS AFTER PETITIONER'S APPEAL ARE IRRELEVANT.

Petitioner urges this Court to adopt a "per se" ineffectiveness rule where, as in this case, appellate counsel suffered a mental breakdown from drug addiction. Also, Petitioner asserts that this claim is based upon recently discovered evidence that came to his attorney's attention after oral argument in his state habeas corpus action.

It is notable that Petitioner has been granted a certificate of appealability regarding his claim of ineffective assistance of appellate counsel under the guise of the following issue; "The Petitioner was denied the effective assistance of counsel on direct appeal because counsel failed to raise the issue of the trial court's errors in refusing to grant defense challenges for cause regarding jurors who would automatically vote for death, and who were convinced of Van Poyck's guilt, when two biased, pro-death jurors ultimately sat on the jury, contrary to the sixth, eighth, and fourteenth amendments." (Petr. App C-2, Habeas Petition Issue 3). Consequently, the Petitioner's entitlement to effective assistance of appellate counsel is already properly before the Eleventh Circuit. Hence, Petitioner's additional argument regarding counsel's drug addiction offers no insight into a determination of the effectiveness of Counsel's representation

Evidence of drug use is not relevant in and of itself, the Court must evaluate the actual conduct in light of the allegations. Bonin v. Calderon, 59 F. 3d 815 (9th Cir. 1995); *see also* Berry v. King, 765 F. 2d 451, 454 (5th Cir. 1985) (finding drug use by attorney not relevant in and of itself to an ineffective assistance of counsel claim; relevant inquiry is whether counsel's performance was deficient and caused prejudice).

In it's order denying the habeas petition, the District Court found that appellate counsel's alleged mental illness and drug abuse was irrelevant. That Court also found that the comparison to sleeping trial counsel was inappropriate. Both the trial court and the Florida Supreme Court found the representation to be effective, and those findings are entitled to a presumption of correctness. Williams v. Taylor, 163 F. 3d 860 (4th Cir. 1998). Most of Van Poyck's newly discovered evidence concerns events years after appellate counsel had finished his representation.

This claim is utterly baseless. Unlike claims of ineffective assistance of trial counsel that are properly raised in a motion for post conviction relief, similar claims involving appellate counsel do not center on the attorney's explanations regarding why certain avenues were explored and others were not. A determination regarding the constitutionality of appellate representation is a purely legal question conducted by an appellate court. Either the claim is legally established or it is not. A factual explanation concerning appellate counsel's motivation is totally irrelevant to the issue.

In this case, Petitioner's evidence relates to a period well after his appeal became final and encompasses a period of time in appellate counsel's life that occurred four years after the initial brief was filed. This claim is completely irrelevant and Petitioner has failed to carry his burden because there is absolutely no evidence in the record that counsel's drug use affected his representation.

Hence, a certificate of appealability was properly denied as reasonable jurists would not disagree on a claim that is legally insufficient as pled.

QUESTION III

PETITIONER HAS NOT MADE A SUBSTANTIAL SHOWING OF A DENIAL OF A CONSTITUTIONAL RIGHT TO MERIT THE GRANTING OF A CERTIFICATE OF APPEALABILITY REGARDING THE EXISTENCE OF THE REQUISITE ENMUND/TISON FINDINGS AND THE APPLICABLE JURY INSTRUCTIONS.

Although Petitioner argues that there was an error regarding the jury instructions, the primary focus pertains to whether there were sufficient findings pursuant to Enmund/Tison. Under Enmund v. Florida, 458 U.S. 82 (1982) and Tison v. Arizona, 481 U.S. 137 (1987), the death penalty can be imposed in a felony murder case if the defendant was a major participant in the underlying crime and intended to kill or had shown reckless indifference to human life.

It is notable that Petitioner has been granted a certificate of appealability regarding his culpability under the guise of the following issue; "Whether the trial judge and trial jury considered an invalid aggravating factor, whether defendant was the triggerman at the sentencing phase (Issue 9 of Petitioner's Habeas Petition to the District Court)"(Petr. App. A-3). Consequently an additional issue with respect to the Petitioner's status as triggerman is unjustified.

Petitioner contends that both the trial court and the Florida Supreme Court failed to make the requisite findings. The Florida Supreme Court specifically found in Van Poyck v. State, 564 So.2d 1066, (Fla. 1990) (*quoting* Tison v. Arizona, 481 U.S. 137 (1987)), that;

in Tison the Court stated that Enmund covered two types of cases that occur at opposite ends of the felony murder spectrum, i.e., "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state" and "the felony murderer who actually killed, attempted to kill, or intended to kill." The Tison brothers, however, presented "the intermediate case of the defendant whose participation is major and whose mental state is one of reckless indifference to the value of human life." The Court recognized that the majority of American jurisdictions which provide for capital punishment "specifically authorize the death penalty in a felony murder case where, though the defendant's mental state fell short of intent to kill, the defendant was the major actor in a felony in which he knew death was highly likely to occur," and that "substantial participation in a violent felony under circumstances likely to result in the loss of innocent human life may justify the death penalty even absent an 'intent to kill.'" Commenting that focusing narrowly on the question of intent to kill is an unsatisfactory method of determining culpability, the Court held "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement."

[a]lthough the record does not establish that Van Poyck was the triggerman, it does establish that he was the instigator and primary participant in this crime. He and Valdez arrived at the scene "armed to the teeth." Since there is no question that Van Poyck played the major role in this felony murder and that he knew lethal force

could be used, we find the death sentence is proportional.

Subsequently, after the Florida Supreme Court affirmed Petitioner's conviction, Petitioner petitioned this Court for review with respect to the Florida Supreme Court's findings, but this Court denied certiorari. Van Poyck v. Florida, 111 S.Ct. 1339 (1991).

Contrary to Petitioner's argument, both of the state courts' findings comply with the Enmund/Tison requirements.

The trial court's order found that Petitioner was a major participant in the felony committed, combined with reckless indifference to human life. The order pointed out that the state clearly presented competent and substantial evidence as to the crime of first degree felony murder and/or first degree premeditated murder. Also, during the discussion of mitigating factors the trial court's order explained how Petitioner planned the escape operation and checked the guns during the trip to see if they were loaded. (ROA, 4199). This satisfied the first portion of the test. In the course of describing the aggravating and potential mitigating circumstances, the court described the acts that showed reckless indifference to human life. It described Appellant's actions at the scene of the murder and the subsequent high speed chase through slippery crowded streets. All the while, Petitioner fired shots at the pursuing police cars. (ROA, 4199).

The same holds true for the Florida Supreme Court. The court determined that Petitioner approached the van, pointed a gun at one of the two corrections officers, Steven Turner, and ordered him out of the van. At the same time, Petitioner's accomplice was on the other side of the van with the decedent, Griffis. Petitioner forced Turner under the van. Soon after Turner saw two sets of feet near the back of the van where he heard a series of shots and Griffis fell to the ground. Petitioner then pulled Turner from under the van and eventually attempted

to kill him. Petitioner admitted that he planned the escape and recruited his accomplice. He also admits that he armed himself with three guns, one of them being the actual murder weapon. Van Poyck, 564 So.2d at 1067-1068.

There was an overwhelming amount of evidence in the instant case to establish that Petitioner's state of mind rose to the level of reckless indifference to human life to warrant the death penalty under Enmund/Tison. To reiterate, Petitioner testified that he planned O'Brien's escape and took responsibility for Griffis' death. Petitioner also admitted to possessing a gun. Officer Turner testified a gun was placed to his head and he heard a click when Petitioner pulled the trigger. Turner also testified that Petitioner told him he was going to die. In sum, Petitioner orchestrated an escape plan for O'Brien, participated with Valdez, his co-defendant, in that escape by attempting to kill one of the guards and discharging numerous rounds of ammunition to insure O'Brien's escape. In addition, Petitioner was shooting at the pursuing police cars in an effort to get away. In light of these factual findings, Petitioner has failed to establish that either the trial court or the Florida Supreme Court applied the incorrect standard when determining the appropriateness of his sentence. Thus, here we have two courts making the requisite finding and not just one.

The record, which includes Van Poyck's own admissions, wholly undermines any claim that Van Poyck's non triggerman status would have resulted in anything less than a capital conviction. Consequently, irrespective of the fact that he wasn't the triggerman, there was overwhelming evidence of his participation in the escape attempt and murder of Officer Griffis.

Hence, the degree of Petitioner's participation was sufficient to support a finding that Petitioner's involvement constituted the intent required by Enmund.

As a sub-issue, Petitioner challenges the propriety of the jury instructions regarding the appropriate requirements under

Enmund/Tison. Petitioner relies on a mis-statement in the transcript which reflects the following instruction;

> In order to recommend a sentence of death, the jury must find that the defendant killed or attempted to kill or intended or contemplated that a killing would take place, or that **illegal** force be employed. However if the jury finds that the defendant was a major participant in the felonies committed and his actions showed a reckless indifference to human life, then the jury may recommend a sentence of death even if the defendant did not actually kill or intend that killing take place (ROA 3582).

Although the transcript seems to support Petitioner's claim, the state refuses to concede that the trial court improperly instructed the jury. This is especially true in light of the fact that there was no objection by defense counsel and that the actual jury instructions themselves, which were physically present with the jurors and available for their review, contained the correct statement of the law. (ROA 4185).

Moreover, the District Court specifically found that the trial court did not improperly instruct the jury and found that it was highly likely that the court reporter heard the common word "illegal" instead of "lethal". (Pet'r App. D-21). The District Court further found that the correct written jury instructions were given to each member of the jury and that the prosecutor and defense counsel both referred to the written jury instructions and read the word **lethal** not illegal. (Pet'r App. D-22).

Petitioner is not entitled to a certificate of appealability because he has failed to satisfy his burden of demonstrating that the erroneous instruction was so prejudicial that it supports a collateral attack on the constitutional validity of the state court's judgment, where the burden is even greater than the showing required to establish plain error on direct appeal. Henderson v.

Kibbe, 97 S.Ct. 1730 (1977). The focus of any inquiry is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not simply "whether the instruction is undesirable, erroneous, or even 'universally condemned.'" Id. at 1739, citing Cupp v. Naughten, 94 S.Ct. 369 (1973).

The state submits that whether the trial court said "lethal" or "illegal" when giving the instructions did not infect the entire trial to the extent that Petitioner's conviction violated due process. Hence, the certificate of appealability was properly denied because reasonable jurists could not disagree that the state court's made the proper findings under Enmund/Tison and that the jury was properly instructed.

"Federal courts are not forums in which to relitigate state trials." Brecht v. Abrahamson, 113 S.Ct. 1710 (U.S.Wis. 1993). "The Court uniformly has been guided by the proposition that the writ of habeas corpus should be available to afford relief to those 'persons whom society has grievously wronged' in light of modern concepts of justice". Id. It is clear that any perceived error in the instant case does not rise to this level.

CONCLUSION

Based on the foregoing arguments and authorities, Respondent respectfully requests that this Honorable Court deny Petitioner's request for certiorari review.

Respectfully submitted,

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